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NIC INSURANCE COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NIC INSURANCE COMPANY, a New York
Corporation,

Plaintiff,

v.

APPIAN CONSTRUCTION CO., INC., a California
Corporation; 1221 MONTICELLO, L.P., a
California Limited Partnership; and DOES 1
through 50, inclusive,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY
RELIEF; CONTRIBUTION;
REIMBURSEMENT

Plaintiff, NIC INSURANCE COMPANY, hereby states and alleges as follows:

GENERAL ALLEGATIONS

1. Plaintiff, NIC INSURANCE COMPANY ("Plaintiff" and/or "NIC"), at all times mentioned herein and material hereto was, and is, a corporation incorporated under the laws of the State of New York. Plaintiff's principal place of business is located in New York, within the State of New York.

2. Plaintiff is informed and believes and, based thereon, alleges that defendant, APPIAN CONSTRUCTION CO., INC. ("APPIAN"), is a corporation, duly organized and

1 incorporated under the laws of the State of California whose principle place of business is located in
2 Concord, California.

3 3. Plaintiff is informed and believes and, based thereon, alleges that defendant, 1221
4 MONTICELLO, L.P. ("1221 MONTICELLO"), is a limited partnership, organized and existing
5 under the laws of the State of California whose principal place of business is located in California.

6 4. The true names and capacities, whether individual, corporate, associate or otherwise
7 of Defendants named herein as DOES 1-50, inclusive, are unknown to Plaintiff at this time and,
8 therefore, Plaintiff sues said Defendants by such fictitious names. Plaintiff will seek leave to amend
9 this Complaint to allege said Defendants' true names and capacities when the same have been
10 ascertained.

11 5. Plaintiff is informed and believes and, based thereon, alleges that Defendants, and
12 each of them, is in some manner legally responsible to Plaintiff for the acts, omissions and damages
13 set forth in this Complaint.

14 6. Plaintiff is informed and believes and, based thereon, alleges that at all times
15 mentioned herein and material hereto, Defendants, and each of them, were the agents, servants,
16 employees, or partners of all other Defendants, and were acting within the course and scope of their
17 agency and employment.

18 7. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332
19 because there is complete diversity of citizenship between Plaintiff and Defendants and the amount
20 in controversy exceeds \$75,000.00, exclusive of interest and costs.

21 8. NIC issued commercial general liability insurance policies to APPIAN and 1221
22 MONTICELLO for consecutive policy periods beginning on July 27, 2002 through July 27, 2005
23 (the "NIC Policies") identified as follows:

- 24 (a) Policy No. GS204295, for period 7/27/02 – 7/27/03;
25 (b) Renewed under Policy No. GS307577, for period 7/27/03 – 7/27/04; and
26 (c) Renewed under Policy No. GS411078, for period 7/27/04 – 7/27/05.

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1 9. Plaintiff is informed and believes and, based thereon, alleges that APPIAN acted as
2 the general contractor with respect to construction of a residence located at 3918 Los Arabis Drive,
3 Lafayette, California (the "Property").

4 10. Plaintiff is informed and believes and, based thereon, alleges that 1221
5 MONTICELLO acted as a developer of real property with respect to the Property.

6 11. Plaintiff is informed and believes and, based thereon, alleges that, on or about
7 February 11, 2002, 1221 MONTICELLO entered into an agreement with Geoffrey and Kathy
8 Manley (the "Manleys") by which the Manleys agreed to purchase the Property.

9 12. Plaintiff is informed and believes and, based thereon, alleges that, on or about
10 February 28, 2005, the Manleys initiated a lawsuit against APPIAN, 1221 MONTICELLO, and
11 others, in the Superior Court of the County of Contra Costa (the "Underlying Action"). The
12 Underlying Action alleged causes of action against APPIAN and 1221 MONTICELLO for
13 Negligence, Strict Liability, Breach of Contract and Rescission in connection with the Property and
14 includes substantial allegations of defects in construction of the Property.

15 13. Plaintiff is informed and believes and, based thereon, alleges that, on or about
16 October 2, 2007, the Manleys filed their Third Amended Complaint for Damages in the Underlying
17 Action. Without admitting the truth of any of the matters asserted or alleged, the truth of which is
18 expressly denied by Plaintiff, the Third Amended Complaint for Damages expressly alleges, at
19 Para. 14, that the defendants, including APPIAN and 1221 MONTICELLO:

20 ...breached their duty of care to plaintiffs and failed to exercise
21 reasonable care in that they failed to properly supervise, inspect,
22 investigate, prepare, and construct the subject residence at the property in
23 that the house suffers from numerous defects, the most prominent of
24 which includes the failure of part of [sic] all of the foundation systems
25 causing the walls and floors to shift and move, the walls and floors and
26 improvements attached thereto to break, crack and/or crumble, windows
27 and doors not to operate properly, floors and walls to be out of level and
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1 plumb, retaining walls and concrete flatwork to move, and other work, all
2 due to defendants', and each of their, failure to ensure that the Subject
3 Property was adequately developed, failure to ensure that the soil was
4 adequately graded and compacted, failure to provide adequate pier support
5 and foundation, failure to comply with applicable building codes and with
6 the plans and specifications, failure to complete their work in a
7 workmanlike manner according to the standard of care, as the case may
8 be. Other defects exist in the property which plaintiffs have yet to
9 discover.

10 14. Plaintiff is informed and believes and, based thereon, alleges that the Third Amended
11 Complaint for Damages filed on behalf of the Manleys is, as of the date of filing of the instant
12 Complaint, the current and operative pleading in the Underlying Action.

13 15. APPIAN and 1221 MONTICELLO tendered a claim to NIC for defense and
14 indemnity in connection with the Underlying Action.

15 16. NIC accepted the tenders of APPIAN and 1221 MONTICELLO and assumed the
16 defense of those entities subject to a reservation of rights. NIC has, as of the date of the filing of the
17 instant complaint, paid substantial sums incurred in the defense of APPIAN and 1221
18 MONTICELLO, subject to a full reservation of rights, and continues to incur and pay such expenses
19 as the litigation of the Underlying Action proceeds.

20 17. Without admitting the truth of any of the matters asserted or alleged, the truth of
21 which is expressly denied by Plaintiff, Plaintiff is informed and believes and, based thereon, alleges
22 that the Manleys have alleged the existence of monetary damages as the result of property damage,
23 and have alleged that APPIAN and 1221 MONTICELLO are legally liable for such damages, in
24 excess of the sum of \$75,000.00.

25 18. Without admitting the truth of any of the matters asserted or alleged, the truth of
26 which is expressly denied by Plaintiff, Plaintiff is informed and believes and, based thereon, alleges
27 that APPIAN and 1221 MONTICELLO contend that one, or more, of the NIC Policies provides
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1 insurance coverage for the damages alleged against those parties by the Manleys in connection with
 2 the Underlying Action and that the sum of such alleged damages is alleged to be in excess of
 3 \$75,000.00.

4 19. Without admitting the truth of any of the matters asserted or alleged, the truth of
 5 which is expressly denied by Plaintiff, Plaintiff is informed and believes and, based thereon, alleges
 6 that, based on the foregoing allegations of property damage prosecuted in the Underlying Action,
 7 the potential claim on behalf of APPIAN and/or 1221 MONTICELLO for indemnity against the
 8 claims asserted by the Manelys in the Underlying Action is alleged to exceed \$75,000.00, thereby
 9 satisfying the amount in controversy component of the jurisdiction of this Court.

10 FIRST CAUSE OF ACTION

11 (Declaratory Relief re: Duty to Indemnify

12 by Plaintiff against APPIAN, 1221 MONTICELLO and DOES 1 through 25)

13 20. Plaintiff incorporates by reference paragraphs 1 through 19 of this Complaint as
 14 though fully set forth herein.

15 21. Plaintiff alleges that an actual and present controversy has arisen by and between
 16 Plaintiff, on the one hand, and APPIAN, 1221 MONTICELLO and DOES 1 through 25, on the
 17 other hand, with respect to each of the following matters:

18 (a) Plaintiff asserts and contends that the NIC Policies contain an endorsement
 19 titled "Subsidence Exclusion" (the "Subsidence Exclusion") which provides as follows:

20 This endorsement modifies insurance provided under the
 21 following.

22 **COMMERCIAL GENERAL LIABILITY COVERAGE 23 PART**

24 This insurance does not apply to and the Company shall have no
 25 duty to defend any claim or "suit" seeking damages for "bodily
 26 injury", "property damage", or "personal and advertising injury"
 27 arising from or related to "subsidence"

28 "Subsidence" includes, but is not limited to, settling, expansion,
 sinking, slipping, falling away, caving in, shifting, eroding, rising,
 tilting, mud flow, or any other movement of land or earth including
 earthquake and landslide.

(b) Plaintiff is informed and believes and, based thereon, alleges that some or all of the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are excluded from coverage under the NIC Policies by operation of the Subsidence Exclusion cited above.

(c) In contrast to the above position, Plaintiff is informed and believes and, based thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 contend that the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are covered under the NIC Policies and not subject to the above-cited exclusion.

(d) Based on the specific allegations asserted in the Underlying Action, Plaintiff is informed and believes and, based thereon, alleges that Plaintiff does not now, and never has, owed a duty to indemnify APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in connection with any claims arising out of, or relating to, the Project and/or the Underlying Action.

22. Plaintiff, further, alleges that the following actual and present controversy has arisen between Plaintiff, on the one hand, and APPIAN, 1221 MONTICELLO and DOES 1 through 25, on the other hand because:

(a) Plaintiff asserts and contends that the NIC Policies contain an "Independent Contractors" endorsement (the "Independent Contractors Endorsement") which provides as follows:

The insured hereby represents and warrants that

1. Commercial general liability insurance for "bodily injury" and "property damage" will be required for all contractors and sub-contractors performing work or operations on behalf of any insured, and the insured shall obtain certificates of insurance from all contractors and sub-contractors performing work or operations on behalf of any insured. Such insurance will be in effect during the duration of the time work is being performed on behalf of any insured, and that
2. The insured will be named as an "additional insured" on the required coverages described in Item 1 above and that

3. The minimum limits and coverages thus required of all contractors and sub-contractors performing work or operations on behalf of any insured shall be

<u>REQUIRED LIMIT</u>	<u>COMMERCIAL GENERAL LIABILITY FORM</u>
\$1,000,000	General Aggregate
\$1,000,000	Products/Completed Operations Aggregate
\$1,000,000	Each Occurrence;

4. Any coverage that might otherwise exist under this policy for claims against any insured based on work done for or on behalf of any insured by a contractor or subcontractor is expressly excess over, and will not contribute with, the insurance required under this endorsement. No duty to defend or indemnify any insured under this policy for any claims that are or should be covered under the policies required of contractors and subcontractors under this endorsement will exist absent exhaustion of all such contractors' and subcontractors' policies

The insured understands that this insurance policy has been issued upon these representations and warranties.

(b) Plaintiff is informed and believes and, based thereon, alleges that some or all of the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are, or should be, covered under the policies required of contractors and subcontractors under the above Independent Contractors Endorsement. Further, Plaintiff is informed and believes and, based thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 failed to comply with the terms of the Independent Contractors Endorsement and, as a result, failed to obtain and ensure that coverage was provided as required therein. Plaintiff contends that no duty to indemnify APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 exists under the NIC Policies to the extent of any claims that are, or should be, covered under the policies required of contractors and subcontractors under the Independent Contractors Endorsement absent exhaustion of all such contractors' and subcontractors' policies.

(c) In contrast to the above position, Plaintiff is informed and believes and, based thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 contend that the

1 defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work
 2 performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the
 3 Underlying Action are covered under the NIC Policies and not subject to the above-cited exclusion.

4 23. Plaintiff, further, alleges that the following actual and present controversy has arisen
 5 between Plaintiff, on the one hand, and APPIAN, 1221 MONTICELLO and DOES 1 through 25, on
 6 the other hand because:

7 (a) Plaintiff asserts and contends that the NIC Policies contain an endorsement
 8 titled "Exclusion – Engineers, Architects or Surveyors Professional Liability" (the "Professional
 9 Liability Exclusion") which provides as follows:

10 This endorsement modifies insurance provided under the following

11 COMMERCIAL GENERAL LIABILITY COVERAGE
 12 PART

13 This insurance does not apply to "bodily injury," "property
 14 damage," "personal injury" or "advertising injury" arising out of
 the rendering or failure to render an professional services by or for
 you, including

- 15 1. The preparing, approving, or failing to prepare or approve
 16 maps, drawings, opinions, reports, surveys, change orders,
 designs or specifications, and
- 17 2. Supervisory, inspection or engineering services

18
 19 (b) Plaintiff is informed and believes and, based thereon, alleges that some or all
 20 of the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to
 21 work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in
 22 the Underlying Action consisted of "professional services" subject to the Professional Services
 23 Exclusion and is excluded from coverage under the NIC Policies and Plaintiff has no duty to
 24 indemnify with respect to such claims.

25 (c) In contrast to the above position, Plaintiff is informed and believes and, based
 26 thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 contend that the
 27 defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work
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1 performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the
2 Underlying Action are covered under the NIC Policies and not subject to the above-cited exclusion.

3 24. Plaintiff alleges and contends that a declaratory judgment is appropriate and
4 necessary at this time in order for the Court to determine the respective rights and liabilities of the
5 parties regarding any indemnity obligation that may exist as between Plaintiff, on the one hand, and
6 APPIAN, 1221 MONTICELLO and/or DOES 1 through 25, on the other hand, with respect to the
7 claims alleged in the Underlying Action.

8 25. Plaintiff has no plain, speedy, or adequate remedy at law.

9 **SECOND CAUSE OF ACTION**

10 (Declaratory Relief re: Duty to Defend

11 by Plaintiff against APPIAN, 1221 MONTICELLO and DOES 1 through 25)

12 26. Plaintiff incorporates by reference paragraphs 1 through 25 of this Complaint as
13 though fully set forth herein.

14 27. Plaintiff alleges that an actual and present controversy has arisen by and between
15 Plaintiff, on the one hand, and APPIAN, 1221 MONTICELLO and DOES 1 through 25, on the
16 other hand, with respect to each of the following matters:

17 (a) Plaintiff asserts and contends that the Subsidence Exclusion in the NIC
18 Policies provides as follows:

19 This endorsement modifies insurance provided under the
20 following.

21 **COMMERCIAL GENERAL LIABILITY COVERAGE
PART**

22 This insurance does not apply to and the Company shall have no
23 duty to defend any claim or "suit" seeking damages for "bodily
24 injury", "property damage", or "personal and advertising injury"
arising from or related to "subsidence"

25 "Subsidence" includes, but is not limited to, settling, expansion,
26 sinking, slipping, falling away, caving in, shifting, eroding, rising,
tilting, mud flow, or any other movement of land or earth including
earthquake and landslide.

(b) Plaintiff is informed and believes and, based thereon, alleges that some or all of the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are excluded from coverage under the NIC Policies by operation of the "Subsidence Exclusion" as cited above.

(c) In contrast to the above position, Plaintiff is informed and believes and, based thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 contend that the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are covered under the NIC Policies and not subject to the above-cited exclusion.

(d) Based on the specific allegations asserted in the Underlying Action, Plaintiff is informed and believes and, based thereon, alleges that Plaintiff does not now, and never has, owed a duty to defend APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in connection with any claims arising out of, or relating to, the Project and/or the Underlying Action.

28. Plaintiff, further, alleges that the following actual and present controversy has arisen between Plaintiff, on the one hand, and APPIAN, 1221 MONTICELLO and DOES 1 through 25, on the other hand because:

(a) Plaintiff asserts and contends that the NIC Policies contain the Independent Contractors Endorsement which provides as follows:

The insured hereby represents and warrants that

1. Commercial general liability insurance for "bodily injury" and "property damage" will be required for all contractors and sub-contractors performing work or operations on behalf of any insured, and the insured shall obtain certificates of insurance from all contractors and sub-contractors performing work or operations on behalf of any insured. Such insurance will be in effect during the duration of the time work is being performed on behalf of any insured, and that
2. The insured will be named as an "additional insured" on the required coverages described in Item 1 above and that

3. The minimum limits and coverages thus required of all contractors and sub-contractors performing work or operations on behalf of any insured shall be

<u>REQUIRED LIMIT</u>	<u>COMMERCIAL GENERAL LIABILITY FORM</u>
\$1,000,000	General Aggregate
\$1,000,000	Products/Completed Operations Aggregate
\$1,000,000	Each Occurrence;

4. Any coverage that might otherwise exist under this policy for claims against any insured based on work done for or on behalf of any insured by a contractor or subcontractor is expressly excess over, and will not contribute with, the insurance required under this endorsement. No duty to defend or indemnify any insured under this policy for any claims that are or should be covered under the policies required of contractors and subcontractors under this endorsement will exist absent exhaustion of all such contractors' and subcontractors' policies

The insured understands that this insurance policy has been issued upon these representations and warranties.

(b) Plaintiff is informed and believes and, based thereon, alleges that some or all of the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are, or should be, covered under the policies required of contractors and subcontractors under the above Independent Contractors Endorsement. Further, Plaintiff is informed and believes and, based thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 failed to comply with the terms of the Independent Contractors Endorsement and, as a result, failed to obtain and ensure that coverage was provided as required therein. Plaintiff contends that no duty to defend APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 exists under the NIC Policies to the extent of any claims that are, or should be, covered under the policies required of contractors and subcontractors under the Independent Contractors Endorsement absent exhaustion of all such contractors' and subcontractors' policies.

(c) In contrast to the above position, Plaintiff is informed and believes and, based thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 contend that the

defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are covered under the NIC Policies and not subject to the above-cited exclusion.

29. Plaintiff, further, alleges that the following actual and present controversy has arisen between Plaintiff, on the one hand, and APPIAN, 1221 MONTICELLO and DOES 1 through 25, on the other hand because:

(a) Plaintiff asserts and contends that the NIC Policies contain the Professional Liability Exclusion which provides as follows:

This endorsement modifies insurance provided under the following

**COMMERCIAL GENERAL LIABILITY COVERAGE
PART**

This insurance does not apply to "bodily injury," "property damage," "personal injury" or "advertising injury" arising out of the rendering or failure to render an professional services by or for you, including

1. The preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications, and
2. Supervisory, inspection or engineering services

(b) Plaintiff is informed and believes and, based thereon, alleges that some or all of the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action consisted of "professional services" subject to the Professional Services Exclusion and is excluded from coverage under the NIC Policies and Plaintiff has no duty to defend with respect to such claims.

(c) In contrast to the above position, Plaintiff is informed and believes and, based thereon, alleges that APPIAN, 1221 MONTICELLO and DOES 1 through 25 contend that the defects in, and damage to, the Property alleged by the Manleys to have arisen with respect to work performed by or on behalf of APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 in the Underlying Action are covered under the NIC Policies and not subject to the above-cited exclusion.

30. Plaintiff alleges and contends that a declaratory judgment is appropriate and necessary at this time in order for the Court to determine the respective rights and liabilities of the parties regarding any defense obligation that may exist as between Plaintiff, on the one hand, and APPIAN, 1221 MONTICELLO and/or DOES 1 through 25, on the other hand, with respect to the claims alleged in the Underlying Action.

31. Plaintiff has no plain, speedy, or adequate remedy at law.

THIRD CAUSE OF ACTION

(For Equitable Contribution and Reimbursement)

by Plaintiff against APPIAN, 1221 MONTICELLO and DOES 1 through 50)

32. Plaintiff incorporates by reference paragraphs 1 through 31 of this Complaint as though fully set forth herein.

33. Plaintiff asserts and contends that it has incurred substantial costs in defending and indemnifying APPIAN, 1221 MONTICELLO and DOES 1 through 50 in connection with the Underlying Action. Such costs have been incurred in order to mitigate these parties' potential liability for the claims and alleged damages asserted in the Underlying Action, and were paid by Plaintiff, at all times, under a complete and express reservation of all applicable rights, including the right to reimbursement and the right to withdraw from the defense.

34. Plaintiff is informed and believes and, based thereon, alleges that, to date, APPIAN, 1221 MONTICELLO and DOES 1 through 50 have failed and refused to pay or secure payment of their requisite portion of such defense and indemnity costs.

35. Plaintiff seeks this Court's determination of the existence of a duty, on the part of APPIAN, 1221 MONTICELLO and DOES 1 through 50, and each of them, to contribute to those sums paid by Plaintiff and/or to reimburse Plaintiff for expenses paid that represent each defendants' share of the costs expended to defend and indemnify APPIAN, 1221 MONTICELLO and DOES 1 through 50 in connection with the Underlying Action. Plaintiff seeks this Court's adjudication of the respective obligation(s) of APPIAN, 1221 MONTICELLO and DOES 1 through 50 to reimburse Plaintiff for all of, or in the alternative, for each such defendant's proper and

1 proportionate share of, such defense costs, as well as for the amounts paid by Plaintiff that represent
2 the costs expended to indemnify and defend APPIAN, 1221 MONTICELLO and DOES 1 through
3 50 in the Underlying Action.

4 36. By reason of the failure of APPIAN, 1221 MONTICELLO and DOES 1 through 50
5 to pay, or contribute any payment, to defend and indemnify APPIAN, 1221 MONTICELLO and
6 DOES 1 through 50 and/or to secure such a proper defense and indemnity in connection with the
7 Underlying Action, APPIAN, 1221 MONTICELLO and DOES 1 through 50 have damaged
8 Plaintiff and are liable to Plaintiff for a proper and proportionate share of such expenses.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as
11 follows:

12 **On the First Cause of Action**

- 13 1. For a declaration that any defects in and/or damage to work performed by
14 APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 are excluded
15 from coverage under the NIC Policies and Plaintiff does not now, nor ever
16 has, owed a duty to indemnify APPIAN, 1221 MONTICELLO and/or DOES
17 1 through 25 due to the Subsidence Exclusion.
- 18 2. For a declaration that Plaintiff does not now, nor ever has, owed a duty to
19 indemnify APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 due to
20 the failure of APPIAN, 1221 MONTICELLO and DOES 1 through 25 to
21 comply with the express terms and conditions set forth in the Independent
22 Contractors Endorsement.
- 23 3. For a declaration that coverage, if any, for APPIAN, 1221 MONTICELLO
24 and/or DOES 1 through 25 provided by Plaintiff is excess to any primary
25 coverage under any policy issued to APPIAN, 1221 MONTICELLO and/or
26 DOES 1 through 25 under the Independent Contractors Endorsement.
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- 1 4. For a declaration that any defects in and/or damage to work performed by
2 APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 are excluded
3 from coverage under the NIC Policies and Plaintiff does not now, nor ever
4 has, owed a duty to indemnify APPIAN, 1221 MONTICELLO and/or DOES
5 1 through 25 due to the Professional Services Exclusion.
- 6 5. For such other and further relief as the Court deems just and proper.

7 **On the Second Cause of Action**

- 8 6. For a declaration that any defects in and/or damage to work performed by
9 APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 are excluded
10 from coverage under the NIC Policies and Plaintiff does not now, nor ever
11 has, owed a duty to defend APPIAN, 1221 MONTICELLO and/or DOES 1
12 through 25 due to the Subsidence Exclusion.
- 13 7. For a declaration that Plaintiff does not now, nor ever has, owed a duty to
14 defend APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 due to the
15 failure of APPIAN, 1221 MONTICELLO and DOES 1 through 25 to comply
16 with the express terms and conditions set forth in the Independent
17 Contractors Endorsement.
- 18 8. For a declaration that coverage, if any, for APPIAN, 1221 MONTICELLO
19 and/or DOES 1 through 25 provided by Plaintiff is excess to any primary
20 coverage under any policy issued to APPIAN, 1221 MONTICELLO and/or
21 DOES 1 through 25 under the Independent Contractors Endorsement.
- 22 9. For a declaration that any defects in and/or damage to work performed by
23 APPIAN, 1221 MONTICELLO and/or DOES 1 through 25 are excluded
24 from coverage under the NIC Policies and Plaintiff does not now, nor ever
25 has, owed a duty to defend APPIAN, 1221 MONTICELLO and/or DOES 1
26 through 25 due to the Professional Services Exclusion.
- 27 10. For such other and further relief as the Court deems just and proper.
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On the Third Cause of Action

11. For reimbursement for sums expended on behalf of APPIAN, 1221 MONTICELLO and DOES 1 through 50 in defense and indemnification in the Underlying Action or, in the alternative, for an appropriate portion thereof; and for contribution by APPIAN, 1221 MONTICELLO and DOES 1 through 50 to future defense and indemnity expenses incurred in the Underlying Action.

12. For such other and further relief as the Court deems just and proper.

Dated: November 26, 2007

WOLKIN • CURRAN, LLP

By: _____

Brandt L. Wolkin

Attorneys for Plaintiff,
NIC INSURANCE COMPANY